

Expert Evidence in the Land and Environment Court

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Expert Evidence in the Land and Environment Court¹

INTRODUCTION

1. The Land and Environment Court increasingly delivers judgments dealing with complex, specialised matters. The purpose of an expert is to provide the Court with the expertise and knowledge that is required to understand and to resolve the dispute between the parties. Where each of the parties present their own experts that are qualified in a particular scientific or professional discipline, each with different opinions, it can be difficult for the Court to synthesise and apply the evidence to the legal issues before it.²

2. But the traditional process has been critiqued by a number of sources as transforming the position of the expert to one of advocate.³ As pointed out by McClellan J, “only the most extraordinary person who has been engaged to prepare and give evidence for a client would, when cross-examined, readily confess error, accept their view was wrong and the client’s money wasted.”⁴

3. As acknowledged in *Wood v R*,⁵ this bias is an almost inevitable result of the adversarial system:

Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of “the team” which has the single objective of solving the problem or problems facing the party who engaged them to “win” the adversarial contest.

4. The Land and Environment Court is particularly vulnerable in this respect as there is a limited pool of experts to give evidence on matters within its jurisdiction. Thus it is likely that experts will endeavour to maintain good relations with those that

¹ The updating of this paper, first presented in 2009, was undertaken by my tipstaff, Ms Louise Gates, for which I am grateful. All errors are my own.

² The Hon Justice Peter McClellan, *Expert Witnesses – the Experience of the Land & Environment Court of New South Wales* (paper presented at XIX Biennial LawAsia Conference 2005, Gold Coast, 24 March 2005), p 8.

³ Ibid.

⁴ Ibid.

⁵ [2012] NSWCCA 21.

retain them, as there is likely to be subsequent litigation for which their services will be required.⁶ It is trite to state that a continued connection, together with remuneration, naturally encourages an expert to do their best for the party engaging them. Another term for this phenomenon is ‘adversarial bias’.

5. The Land and Environment Court has employed several methods in order to respond to the difficulties surrounding expert evidence, including: the use of parties’ single or joint experts or court appointed experts, the use of concurrent evidence procedures and the employment of specialised Commissioners.

6. This paper will, first, provide an overview of the rules governing expert evidence; second, discuss practice and procedure in the Land and Environment Court in relation to expert evidence; third, provide a short examination of the merits and criticisms of court appointed and parties’ single experts, and concurrent evidence procedures; and fourth and finally, make some general comments about the critical need to maintain independence as an expert.

RULES IN RELATION TO EXPERT EVIDENCE

7. The rules governing experts, and their evidence, are found in the:

- (a) *Evidence Act 1995* (NSW);
- (b) *Civil Procedure Act 2005* (NSW) (“CPA”);
- (c) *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”);
- (d) *Land and Environment Court Act 1979* (NSW);
- (e) *Land and Environment Court Rules 2007* (NSW); and
- (f) *Land and Environment Court Practice Notes*

Evidence Act 1995

⁶ Ibid, p 10.

8. Expert evidence is generally governed by the *Evidence Act*, in particular, ss 76-79. Although s 76 sets out a general prohibition on opinion evidence, s 79 provides that evidence provided by an “expert”, or someone with “specialised knowledge based on training, study or experience”, is an exception to this principle. It is first necessary to identify the fact in issue on which expert evidence is to be adduced, as the initial question that arises in relation to s 79 is whether the subject matter of the opinion is such that a person without experience in the area would be able to form a sound judgement on the matter without the assistance of a person possessing specialised knowledge, which is in a field that is sufficiently recognised as a reliable body of knowledge.⁷ In *Lithgow City Council v Jackson*,⁸ for example, the High Court held that evidence contained within ambulance officers’ records relating to the medical condition of the respondent did not constitute expert evidence within the meaning of s 79 because the ambulance officers were not sufficiently qualified to give an expert medical opinion.

9. For an expert’s opinion to be admitted into evidence on a particular issue, three requirements must be satisfied. First, the expert must have specialised knowledge that they are able to demonstrate to the court is based on the person’s training, study or experience, and the evidence must be wholly or substantially based on that specialised knowledge.⁹ It is helpful to identify with precision the issue on which the expert opinion is being proffered, as this will aid in identifying the specialised knowledge, based on training, study or experience, that the expert will need to possess.¹⁰

10. The rationale behind this requirement was outlined by Gleeson CJ in *HG v The Queen*¹¹:

⁷ *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ, *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J and at 130 per Dawson J, *Farrell v The Queen* (1998) 194 CLR 286 at 292-294 per Gaudron J, *Osland v The Queen* (1998) 197 CLR 316 at 336 per Gaudron and Gummow JJ and *HG v The Queen* (1999) 197 CLR 414 at 432.

⁸ (2011) 244 CLR 352.

⁹ *Evidence Act 1995* (NSW), s 79(1).

¹⁰ See The Hon Justice Cathy Branson, *Expert Evidence: a Judge’s perspective* (paper presented at the inaugural Australian Women Lawyers Conference, Sydney, 29-30 September 2006).

¹¹ (1999) 197 CLR 414 at [44].

Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.

11. This passage was quoted and applied in *Wood v R*¹². In that case, the expert witness, Prof Cross, had given evidence at trial that it was possible that the accused, Mr Wood, had "spear thrown" his girlfriend, Ms Byrne, from the "northern ledge of the Gap". The Court of Appeal held that this evidence fell outside Prof Cross' field of specialised knowledge because significant aspects of it were concerned with biomechanics, which required an understanding of the functioning and capacity of the human body, whereas Prof Cross' qualifications were in physics, particularly in plasma physics.

12. Similarly, in *Gilham v R*,¹³ the Court of Criminal Appeal held that the expert witness, Dr Culliford, a forensic physician who had experience attending crime scenes and assisting forensic pathologists during post-mortems, had insufficient expertise to support her opinion that the deceased's wounds showed sufficient similarity to constitute a pattern.

13. In *Dasreef Pty Ltd v Hawchar*,¹⁴ the High Court unanimously held that a failure to demonstrate that an opinion expressed by a witness is based on his or her training, study or experience is a matter that goes to the admissibility of the evidence, not its weight.¹⁵ For this reason, the Court held that the trial judge erred in failing to make a ruling regarding the admissibility of evidence contained in a report by the expert witness, Dr Basden, as to the quantitative level of Mr Hawchar's exposure to silicon dust.¹⁶ Dr Basden had given evidence of his training, study and experience, but he had not given evidence asserting that this training and experience permitted him to provide anything more than a "ballpark figure" estimating the amount of silica dust to which a worker using an angle grinder would be exposed. Neither had he taken any direct measurements or performed any inferential calculations to determine the likely

¹² [2012] NSWCCA 21 at [466].

¹³ [2012] NSWCCA 131 at [344].

¹⁴ (2011) 243 CLR 588.

¹⁵ *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42]. See also *Gilham v R* [2012] NSWCCA 131 at [345].

¹⁶ *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [19].

level of silica dust exposure. There was, therefore, no footing upon which the judge at first instance could conclude that a numerical opinion expressed by Dr Basden was wholly or substantially based on his specialised knowledge, training or experience.¹⁷

14. Second, the expert is required to set out all the assumptions upon which the opinion is proffered. If the opinion is based on facts ‘observed’ by the expert, they must be identified and proved by the expert, or if the opinion is based on ‘assumed’ facts, they must be identified and proved in some other way.¹⁸ Unless the facts upon which the opinion is based can be established, the expert’s opinion will be inadmissible, or if admitted, given very little weight.¹⁹

15. Third, the expert must also set out all of the reasoning he or she has engaged in to arrive at his or her conclusion. A report that simply states the opinion given or conclusion reached without elucidating how the expert arrived at this conclusion will usually be rejected by the Court.²⁰

16. The rules contained in ss 135-137 of the *Evidence Act* are also relevant, as these provide the final discretionary barrier that a party seeking to tender evidence must overcome before that evidence is admitted. These rules provide that the evidence will not be admitted unless its probative value substantially outweighs the danger that it might otherwise mislead or confuse or be unfairly prejudicial to a party.

17. In *Gilham v R*,²¹ for example, the Court of Criminal Appeal held, applying s 137 of the *Evidence Act*, that the evidence of three Crown experts that the deceased’s wounds “appeared similar” ought to have been rejected by the trial judge. This was because the evidence was of little probative value and there was a risk, which the

¹⁷ Ibid at [40].

¹⁸ *Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705 at [85], *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [64] per Heydon JA and *Gilham v R* [2012] NSWCCA 131 at [186].

¹⁹ *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66] per Heydon JA and *Gilham v R* [2012] NSWCCA 131 at [186].

²⁰ *Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705 at [85], *R v Tang* (2006) 161 A Crim R 377; *HG v The Queen* (1999) 197 CLR 414 and *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [100] per Heydon JA.

²¹ [2012] NSWCCA 131 at [346].

trial judge's directions could not protect against, that the jury would impermissibly use the collective force of this evidence to infer that the similarity created a pattern.

18. The rules of evidence do not apply to all Classes of the Land and Environment Court's jurisdiction. For example, the Court may choose not to be bound by the *Evidence Act* in Class 1, 2 or 3 proceedings.²² This is also the case in Class 5 sentencing matters. However, it is prudent to prepare all expert evidence as if the rules do apply.

UCPR

19. The Court has incorporated the UCPR from 29 January 2008. Part 31, Div 2, Subdiv 5 r 31.17-54 of the UCPR provides a comprehensive and prescriptive outline of the practice and procedure in relation to expert evidence.

20. Importantly, the UCPR states that the expert witness' paramount duty is to the Court and not to any party to the proceedings.²³

21. Under UCPR r 31.17 the main purposes for the provision of expert evidence are set out. These include for the Court: to have control over the giving of expert evidence;²⁴ to restrict expert evidence in proceedings to only that which is reasonably required;²⁵ to avoid unnecessary costs associated with retaining different experts;²⁶ to ensure a fair trial of proceedings, and allow for more than one expert if necessary;²⁷ to declare the duty of an expert witness in relation to the Court and the parties to proceedings;²⁸ and, according to r 31.17(d) (emphasis added):

if it is *practicable* to do so *without compromising the interests of justice*, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court.

²² *Land and Environment Court Act 1979* (NSW), s 38(2).

²³ UCPR r 31.23 and Sch 7 cl 2(2).

²⁴ UCPR r 31.17(a).

²⁵ UCPR r 31.17(b).

²⁶ UCPR r 31.17(c).

²⁷ UCPR r 31.17(e).

²⁸ UCPR r 31.17(f).

22. Any party looking to adduce expert evidence must promptly seek directions in this regard.²⁹ A court may give directions regarding expert witnesses, including directions: limiting the number of expert witnesses who may be called;³⁰ providing for the engagement and instruction of a parties' single expert;³¹ providing for the appointment and instruction of a court appointed expert;³² requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in order to endeavour to reach an agreement on any matters in issue,³³ or any other direction that may assist an expert in the exercise of the expert's functions.³⁴

23. Under the UCPR, as soon as practicable after an expert has been appointed he or she must be provided with a copy of the expert witness' code of conduct. The code is contained in Sch 7 of the UCPR. Prior to the decision in *Wood v R*,³⁵ the position in relation to the admissibility of evidence of an expert witness who had failed to acknowledge having read the code and having agreed to be bound by it was uncertain.

24. The default position is contained in UCPR r 31.23(3), according to which a failure to acknowledge the code will result in expert evidence, including an expert's report, being inadmissible.³⁶ However, the decision in *Wood* now clarifies that an expert's evidence is not automatically rendered inadmissible merely because the expert has overlooked the code.³⁷ The question of admissibility is ultimately to be determined in accordance with the principles underlying the law of evidence.³⁸ Therefore, the fact that an expert has failed to acknowledge the code should be taken into account as a factor in determining whether, under ss 135-137 of the *Evidence Act*, the probative value of that evidence substantially outweighs the danger that it might mislead or

²⁹ UCPR r 31.19.

³⁰ UCPR r 31.20(2)(e).

³¹ UCPR r 31.20(2)(f).

³² UCPR r 31.20(2)(g).

³³ UCPR r 31.20(2)(h), 31.24(1)

³⁴ UCPR r 31.20(2)(i).

³⁵ [2012] NSWCCA 21.

³⁶ *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128 at [43].

³⁷ *Wood v R* [2012] NSWCCA 21 at [728]. See also *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 at [12], *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764 at [33] and *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153.

³⁸ *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [15].

confuse or be unfairly prejudicial to a party.³⁹ A positive answer to this question will result in that evidence being admissible; a negative answer may result in it being rejected.

25. The practical utility of evidence not being automatically rendered inadmissible as a result of the expert not having acknowledged the code is demonstrated by cases such as *Barak Pty Ltd v WTH Pty Ltd (T/AS Avis Australia)*⁴⁰, where Barrett J granted leave to examine an expert witness whose report did not contain an acknowledgement that he had read the code of conduct, but who acknowledged that he was aware of the code when preparing his report and agreed to be bound by it.

26. As Barrett J noted in *Tim Barr Pty Ltd v Narui Gold Coasts Pty Ltd*⁴¹:

The concern is a quality assurance concern: to be sure that an expert has approached the task responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court. As a general rule, a written statement of the opinion of an expert should not be accepted as authoritative on a matter within the relevant field of expertise unless the person expressing the opinion is shown to have proceeded in that way; but the court may, in a particular case, allow the statement to be admitted even where the person is not shown to have proceeded in that way.

27. Similarly in *NM Rural Enterprises v Rimanui Farms Ltd*⁴², a report that was initially prepared for the plaintiff in 2001 without acknowledgement of the code of conduct, but was substantially reproduced in 2005 with acknowledgement of the code, was held to be admissible. Harrison J stated:⁴³

It would ... be an excessive and somewhat slavish insistence on regulation and form in the particular circumstances of this case to permit the Code to operate in a way that excluded a report that has not caused any discernible forensic or procedural prejudice, and in circumstances where I am also satisfied that it contains a useful and reliable expression of opinion...

28. In reviewing the authorities in relation to r 31.23 of the UCPR, White J has noted that the primary reason for the expert witness' code of conduct "was to address

³⁹ *Wood v R* [2012] NSWCCA 21 at [728]-[729] and *Lopmand Pty Ltd* [2003] NSWSC 870 at [15].

⁴⁰ [2002] NSWSC 649 at [5]. This case was in relation to the applicable schedule at the time, Schedule K, the acknowledgement is now found under Schedule 7 of the UCPR.

⁴¹ [2009] NSWSC 49 at [46].

⁴² [2010] NSWSC 945.

⁴³ *NM Rural Enterprises v Rimanui Farms Ltd* [2010] NSWSC 945 at [20].

concerns about impartiality”.⁴⁴ His Honour went on to distinguish situations where ‘expert’ statements of opinion are prepared in non-litigious circumstances, which do not give rise to the same concerns in relation to adversarial bias, because:⁴⁵

...where the expert has no reason to be partial, there may be strong grounds for admitting an expert’s report not prepared for litigation, even where the [c]ode of [c]onduct has not been considered. The absence of a motive to be partial is a stronger indication of impartiality than a promise to be impartial.

Court Appointed Experts and Joint Experts

29. Under the UCPR the rules in relation to court appointed experts and parties’ joint experts are virtually identical.

30. If parties do not wish to use a joint expert but the Court finds that a single expert would be appropriate in that case, the Court may at any stage of the proceedings appoint a “court appointed expert” to inquire into and report on the issue.⁴⁶ On the other hand, when both parties do agree to have one expert presenting evidence this is called a “parties’ single expert” or a “joint expert”.⁴⁷ Both “court appointed experts”⁴⁸ and “parties’ single [or joint] experts”⁴⁹ are remunerated by the parties.

31. In terms of parties’ joint experts, “the parties affected must endeavour to agree on written instructions to be provided to the parties’ joint expert concerning the issues arising for the expert’s opinion and concerning the facts, and assumptions of fact, on which the report is to be based.” If the parties are unable to agree they must seek directions from the Court.⁵⁰

32. Once the parties’ joint expert report has been sent to the parties, unless the Court orders otherwise, the parties may only seek clarification of the report once.⁵¹

⁴⁴ The Hon Justice Richard White, “Overview of the Evidence Act” (2010) 34 *Australian Bar Review* 71.

⁴⁵ The Hon Justice Richard White, *ibid*, p 100.

⁴⁶ UCPR r 31.46.

⁴⁷ UCPR r 31.37.

⁴⁸ UCPR r 31.53.

⁴⁹ UCPR r 31.37.

⁵⁰ UCPR r 31.38.

⁵¹ UCPR r 31.41.

33. Rule r 31.17(d) of the UCPR sets two criteria for the appointment of a court appointed expert. First, it must be *practical* to use a court appointed expert, and second, their engagement must be *without compromising the interests of justice*.

34. In terms of a court appointed expert, the Court may give directions as to the issues the report is to address; the facts, and assumptions of fact, on which the report is to be based; or instruct the parties to agree on the instructions to be provided to the expert.⁵²

35. In terms of a court appointed expert's report, the parties have to apply to the Court for leave in order to be able to seek clarification of any aspect of the report.⁵³

36. In *Abbey National Mortgages v Key Surveyors Nationwide Ltd*,⁵⁴ for example, the parties wished to provide their own experts to value each of the 29 properties in dispute located around England. This would result in a total of 58 experts. The parties later agreed to reduce the number to 12.

37. Facing the inefficient and expensive task of hearing a large number of experts, the judge ordered the appointment of a court appointed expert to value all the properties in the interests of a just, expeditious and economical resolution of the case. One party argued a court appointed expert would disadvantage their case because the expert would be without intimate knowledge of property prices and extrinsic criteria relevant to those property prices in areas unfamiliar to the expert. The Court held that not only was the procedure of one expert more practicable, but also "that there could be no unfairness when both parties were in the same position."⁵⁵

⁵² UCPR r 31.47.

⁵³ UCPR r 31.50.

⁵⁴ [1996] 3 All ER 184.

⁵⁵ *Abbey National Mortgages v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184 per Bingham MR at 187.

38. This example illustrates how evidence from the parties' experts would result in disproportionate costs and excessive use of court time and thus a court appointed expert was more appropriate.

39. Upon completion the court appointed expert's report must be sent to the Registrar and the parties.⁵⁶ Should the expert change their opinion on a substantial matter in the proceedings, a supplementary report must be provided to the Registrar.⁵⁷ Any party affected by the expert's evidence may request the expert to attend Court for cross-examination with reasonable notice.⁵⁸

40. In *Port Securities Pty Ltd v Wollongong City Council*⁵⁹ one party sought to adduce new evidence on the basis that a different analytical process could have been used to arrive at a different outcome than that established by the court appointed expert. Pain J of the Land and Environment Court found the demonstration of more than one analytical process of expert analysis to be of assistance to the Court in considering the weight attributable to the court appointed expert's evidence.⁶⁰ Her Honour stated an appropriate course of action for parties unhappy with a court appointed expert's report is for parties to write to the court appointed expert setting out the issues of concern. Through this process the court appointed expert's report could be amended and an alternative expert's report would be unnecessary.⁶¹

41. In most cases where a party objects to a court appointed expert it is unlikely that the Court will not allow the parties to call their own experts, or use a joint expert, as a matter of fairness.

42. Of course a joint or court appointed expert may not always be appropriate. The United Kingdom has encountered cases (mostly medical) where there has been more than one school of thought on an issue that contributes substantially to the final

⁵⁶ UCPR r 31.49.

⁵⁷ UCPR r 31.49.

⁵⁸ UCPR r 31.51.

⁵⁹ (2006) 145 LGERA 285.

⁶⁰ *Port Securities Pty Ltd v Wollongong City Council and Another* (2006) 145 LGERA 285 at 290 [15].

⁶¹ *Ibid* at 290 [16].

determination of liability and/or causation of a matter.⁶² On these occasions, it has been held that it is not suitable to appoint a single expert who may employ only one method of analysis.⁶³

EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT

Use of Experts in the Land and Environment Court

43. Prior to the appointment of an expert the Court Practice Notes require that parties consider whether expert evidence is necessary to resolve the dispute.⁶⁴

44. During McClellan J's tenure as Chief Judge of the Court, his Honour encouraged the use of court appointed experts. Indeed during the period between March 2004 and April 2005 there were 171 court appointed experts in this Court.⁶⁵ In 2010, by contrast, there were only 5 joint single experts and no court appointed experts. This change in practice reflects, in part, perceptions of fairness concerning court appointed experts and the decision by the Court to utilise Commissioners with expertise in specific areas.

45. The position of the current framework, as outlined in the Court Practice Notes for Class 1, 2, 3 and 4 proceedings is, first, to encourage parties to use a parties' joint expert, and should the parties disagree, then the Court may appoint an expert if appropriate to do so. Typically, matters relating to more objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and some contamination issues are seen as suitable for a parties' joint expert.

46. In considering whether it is appropriate to use a parties' joint expert, the Court Practice Notes set out a number of criteria, including:

- (a) the importance and complexity of the subject matter in dispute;

⁶² M Livingstone, "Have we fired the 'hired gun'? A critique of expert evidence reform in Australia and the United Kingdom" (2008) 18 *Journal of Judicial Administration* 39, p 43.

⁶³ *Simms v Birmingham Health Authority* [2001] Lloyd's Rep 382 as cited in M Livingstone, *ibid*, p 43.

⁶⁴ *Practice Note Class 1 Development Appeals* at [42], *Practice Note Class 1 Residential Development Appeals* at [53], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [30] and *Practice Note Class 3 Valuation Objections* at [34].

⁶⁵ New South Wales, Attorney General's Law Reform Commission, *Report 109 Expert Witnesses*, (June 2005), p 37.

- (b) the costs involved in obtaining a parties' single expert compared to individual party experts;
- (c) whether the parties' joint expert is reasonably likely to narrow the scope of the issue(s) in dispute;
- (d) the nature of the issue, including whether it may be answered in an objectively verifiable manner, involves the application of accepted criteria (such as the Australian Standards) or is subject to varying methodologies or schools of thought;
- (e) the timing of appointment, whether the single expert has sufficient data to provide a report and whether the parties are prepared to proceed to hearing on the basis of that report; and
- (f) whether the integrity of the expert evidence is likely to be enhanced.⁶⁶

47. The Court Practice Notes, however, do not discuss the circumstances when a court appointed expert is appropriate. One such circumstance is where a parties' single expert is appropriate but the parties disagree as to which single expert, it is appropriate to engage a court appointed expert.

48. Some commentators argue in cases where legal and factual issues are complex or the quantum is large, it is not appropriate to use court appointed or parties' single experts. Rather in these cases each party should be heard on their own evidence.⁶⁷ However, given the nature of Class 1, 2, 3 and most Class 4 and 5 (especially sentencing matters) proceedings in this Court, the use of a single expert ought to be appropriate.

49. The main arguments for parties' joint experts or court appointed experts are that first, when the issue is one that usually requires only one answer (such as noise) there is no need for more than one expert. Second, it saves costs and time. Third, it

⁶⁶ *Practice Note Class 1 Development Appeals* at [42]–[43], *Practice Note Classes 1, 2 and 3. Miscellaneous Appeals* at [30]–[31], *Practice Note Class 3 Compensation Claims* at [28] and *Practice Note Class 3 Valuation Objections* at [35].

⁶⁷ M Livingstone, above n 62, p 43.

has been argued that the Court has the benefit of hearing from at least one expert who is unaffected by adversarial bias.

50. Where the parties have agreed to a parties' joint expert in relation to a specific issue they may not adduce evidence of another expert without the leave of the Court, in relation to that issue.⁶⁸ In determining whether to grant leave, the Court will consider the issues involved in the dispute and whether the cost involved in obtaining further evidence is proportionate to the length and complexity of the dispute.

51. An apprehension of bias may be sufficient to ensure a grant of leave. In granting leave, the Court will also consider whether the party thinks that the joint expert may be wrong because another expert takes a different view.⁶⁹

52. It is important that this facility remains for parties to adduce further evidence so that trial by a parties' joint expert or court appointed expert does not become a substitute for trial by a judge.⁷⁰ The Court must balance the need to restrain the costs of litigation against the need for the parties to be fully heard on the matters in dispute.

53. The three considerations of the Court on an application to adduce further expert evidence are:

- (a) first, the proportionality of the cost of extra evidence relative to the size of the dispute;
- (b) second, whether there is competing respected expert opinion; and
- (c) third, whether the party affected would have a legitimate sense of grievance that it had not been permitted to advance its case at trial.⁷¹

⁶⁸ *Practice Note Class 1 Development Appeals* at [47], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [35], *Practice Note Class 3 Compensation Claims* at [31] and *Practice Note Class 3 Valuation Objections* at [39].

⁶⁹ *Cosgrove v Pattison* [2000] All ER 2007 at 2007.

⁷⁰ *Tomko v Tomko* [2007] NSWSC 1486 at [9].

⁷¹ *Wu v Statewide Developments Pty Limited* [2009] NSWSC 587 at [17].

Timing

54. The Court Practice Notes provide a guideline as to when expert evidence should be utilised in proceedings. The late engagement of experts has been a source of criticism for some time.

55. The Court Practice Notes state that expert evidence, and the consideration and appointment of a single or joint expert, should be raised at the first or second directions hearing. An early discussion concerning the necessity of expert evidence encourages parties to crystallise and settle the real issues early and understand the specialised areas about which an expert will be engaged to provide evidence, prior to retaining the expert.

Selection of Joint and Court Appointed Experts in the Land and Environment Court

56. In cases where parties agree to use a joint expert, but disagree as to the identity of that expert, the Court Practice Notes direct each party to put forward three names each with accompanying *curriculum vitae* to the Court.⁷² The Court usually makes a selection from that pool.⁷³

57. For court appointed experts the Court follows the same procedure, although this is not noted in the Court Practice Notes.

58. The UCPR and Court Practice Notes do not, however, outline selection criteria for court appointed or parties' joint experts other than to state that the Court will not usually accept the appointment of an expert if that expert is unable to provide a

⁷² *Practice Note Class 1 Development Appeals*, Sch D, A 5(c), *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals*, Sch A, A 5(c); *Practice Note Class 3 Compensation Claims*, Sch A, 3(c), *Practice Note Class 3 Valuation Objections*, Sch B, 8(c) and *Practice Note Class 4 Proceedings*, Sch A, B 1A (ii).

⁷³ *Practice Note Class 1 Development Appeals*, Sch D, C 1A (iii), (iv), *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals*, Sch A, C 1A (iii), (iv), *Practice Note Class 3 Compensation Claims*, Sch B, 1A, *Practice Note Class 3 Valuation Objections*, Sch C, 1A and *Practice Note Class 4 Proceedings* Sch A, B 1A (iii), (iv).

report within five weeks of receiving the brief or is unable to attend a hearing within a further 28 days thereafter.⁷⁴

59. Some additional criteria have been identified by Preston J, which include:⁷⁵

- (a) the issue in dispute relates to a field of knowledge that requires an expert opinion to be given;
- (b) the field of knowledge in which the expert is to express an opinion is one which the law recognises;
- (c) the person is qualified in the recognised field and has acquired specialised knowledge based on their training, study or experience that relates to the relevant question in issue;
- (d) the person is impartial;
- (e) the person is ready, willing and able to perform the work necessary to discharge the duty as a joint or court appointed expert; and
- (f) the person is able to perform their duties as a joint or court appointed expert at a cost that is proportional to the importance and complexity of the subject matter in dispute in the proceedings.

Traditional Individual Party Experts vs Court Appointed or Joint Experts

60. The increasingly frequent use of expert evidence in the Land and Environment Court has highlighted the limitations of the traditional model of cross-examination of each of the party's experts. Concerns have arisen in relation to experts feeling like they were unable to explain their evidence properly due to the fact that they were constrained by having to answer the cross-examiner's questions; evidence remaining difficult to understand or ambiguous post cross-examination; experts

⁷⁴ *Practice Note Class 1 Development Appeals* at [44], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [32] and *Practice Note Class 3 Valuation Objections* at [36].

⁷⁵ The Hon Justice B J Preston, *Appointment of Court Appointed Expert Witnesses in the Land and Environment Court* (paper presented at the Urban Development Institute of Australia Legal Luncheon, Sydney, 21 March 2006), pp 3-4.

being biased or acting as advocates; and the process being lengthy and taking too much time to get to the point of difference or disagreement between the experts.⁷⁶

61. As previously mentioned, the Land and Environment Court has employed several strategies in order to overcome the difficulties associated with expert evidence. The merits and criticisms of two of these strategies will be discussed below.

62. The problem of adversarial bias in relation to expert witnesses has been identified by a number of sources. It was noted in an empirical study carried out by the Australian Institute of Judicial Administration that more than a quarter of judges have experienced bias on the part of experts.⁷⁷ One of the identified ways of responding to the difficulty in obtaining objective expert evidence is through the use of joint experts or court appointed experts.⁷⁸

63. However, Downes J of the Federal Court believes in the adversarial model and treats with caution the encouraged use of parties' joint experts and court appointed experts. His Honour believes the adversarial method of cross-examination⁷⁹, cross checking evidence and involvement of more expert opinion crystallises more acutely the criteria required to evaluate issues than a single opinion can.⁸⁰

64. His Honour opines:⁸¹

I do not find anything untoward in expert witnesses presenting different perspectives. This is what counsel do all the time. The limitation is that they must be sustainable perspectives presented in a way which can be evaluated. I do not even mind experts who are "hired guns" provided that they are not presenting evidence that is unsustainable ...

⁷⁶ For a more expansive list see The Hon Justice Steven Rares, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues* (paper presented at the New South Wales Bar Association Continuing Professional Development seminar, 23 August 2010), p 2.

⁷⁷ I Freckleton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration, 1999), p 38.

⁷⁸ The Hon Justice Garry Downes AM, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

⁷⁹ The Hon Justice Garry Downes AM "Problems with expert evidence: are single or court-appointed experts the answer?" (2006) 15 *Journal of Judicial Administration* 185, p 188.

⁸⁰ *Ibid*, p 187.

⁸¹ *Ibid*, p 187.

65. Further, it has been noted that the fact that the different experts do not reach the same conclusion is not inherently a bad thing.⁸² The differing criteria exposed by the different experts will enable the judge to reach his or her own conclusion.

66. A joint or court appointed expert, by contrast, has no interaction with the parties other than to clarify evidence or to be cross-examined on it and this will only happen when both parties are present. Separated from the environment of one party, a court appointed or joint expert is more likely, in my view, to be disinterested in the result of a case and, therefore, give more neutral evidence.

Concurrent Evidence

67. The prevailing approach of the Land and Environment Court of taking expert evidence is to do so concurrently, or 'hot-tubbing'.⁸³ This is the norm rather than the exception. Unless the judge or commissioner orders otherwise, the relevant experts on a particular point are sworn-in together and remain together during the entirety of their evidence, as opposed to the traditional approach where each expert presents their evidence and is separately made available for cross-examination. This approach facilitates a discussion between the experts, the advocates and the judge, and helps to narrow the issues in dispute.

68. Essentially, the giving of concurrent evidence involves seven distinct stages:

- (a) first, identification of the issues upon which expert evidence is needed;
- (b) second, the preparation of individual expert reports;
- (c) third, a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is

⁸² The Hon Justice Steven Rares, above n 76, p 7.

⁸³ UCPR r 31.35(c); *Practice Note Class 1 Development Appeals* at [56], *Practice Note Class 1 Residential Development Appeals* at [63], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [44], *Practice Note Class 4 Proceedings* at [48], *Practice Note Class 3 Compensation Claims* at [39] and *Practice Note Class 3 Valuation Objections* at [48].

agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree;

- (d) fourth, the preparation of the joint report
- (e) fifth, the experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence;
- (f) sixth, the experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert; and
- (g) seventh, cross-examination of the experts is permitted. During this process, each party is permitted to rely on their own expert for clarification of an answer.⁸⁴

69. The procedure for giving expert evidence concurrently is not presently prescribed in the Practice Notes, but is an idiosyncratic process that varies from case to case and judge to judge, which has been succinctly summed up as whichever expert “has the microphone has the floor.”⁸⁵

70. Proponents of concurrent evidence, including Garling and Rares JJ, argue that the procedure narrows the issues in dispute, allows all evidence to be presented to the decision-maker at the same time, reduces the likelihood of adversarial bias and saves costs and time.⁸⁶

⁸⁴ See The Hon Justice Steven Rares, above n 76, p 7, Neil J Young QC, *Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?* (paper presented at the Commercial Court Seminar, 27 October 2010), p 2, The Hon Justice Peter Biscoe, *Expert Witnesses: Recent Developments in NSW* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, 16 September 2006), p 6 and *Strong Wise Ltd v Esso Australia Resources Ltd* (2010) 185 FCR 149 at [93].

⁸⁵ The Hon Justice Steven Rares, above n 76, p 11.

⁸⁶ The Hon Justice Peter Garling, “Concurrent Expert Evidence: Reflections and Development”, (2011) 49(10) *Law Society Journal* 59, p 60 and The Hon Justice Downes, above n 78, p 4.

71. Rares J notes that this procedure is beneficial in that it reduces the chance of the first expert “obfuscating in an answer” and, due to the fact “that each expert knows his or her colleague can expose any inappropriate answer immediately, and also can reinforce an appropriate one, the evidence generally proceeds to the critical...points of difference.”⁸⁷ Further, Garling J identifies that, by effectively identifying the areas of disagreement between the experts, concurrent evidence procedures reduce the hearing time, facilitating the “just, quick and cheap” resolution of the real issues in dispute.⁸⁸ It has been noted that evidence in the Land and Environment Court can now be taken in half the time when using concurrent evidence procedures.⁸⁹

72. Whilst concurrent expert evidence has enjoyed significant support in the Land and Environment Court, it has not been universally accepted. Critics of concurrent evidence procedures, such as Davies J, note that it only serves to increase the adversarial nature of the proceedings. Davies J argues that the ‘hot tub’ turns expert witnesses into expert advocates, with the likely result of producing one of two undesirable consequences:

The first is that the judge will be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them has been shaken in the process. The second and, unfortunately more likely, consequence is that the judge will be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increases as the complexity of the question in issue increases.

73. Furthermore, critics of concurrent evidence note that, due to the fact the structure of concurrent evidence varies from court to court, the utility of such procedures is greatly dependant on the ability of the judge to direct the discussion, to ensure that all points of view are aired, and that it does not degenerate into an argument between the experts.⁹⁰

74. Whilst commending the underlying philosophy of concurrent evidence, Rackemann DCJ of the Queensland Planning and Environment Court argues that the “Hot Tub method” is “too limited in its application and applies too late in the

⁸⁷ The Hon Justice Steven Rares, above n 76, pp 10-11.

⁸⁸ The Hon Justice Peter Garling, above n 86, p 59 and *Civil Procedure Act 2005* (NSW), s 56.

⁸⁹ The Hon Justice Peter McClellan, above n 2, p 19.

⁹⁰ Lisa Wood, “Experts Only: Out of the Hot Tub and into the Joint Conference” (2007) *Anti-Trust* 89.

process to be considered as a viable substitute for appropriate management at an earlier stage”⁹¹. His Honour warns that:⁹²

One of the problems with the enthusiastic promotion of concurrent evidence is that it has tended to give the impression that it is “the” method for adducing expert evidence and is, in itself, a sufficient way to address concerns surrounding expert opinion evidence. In truth, it is neither. It is a tool, the usefulness of which will vary according to the context in which it is used, and the manner in which it is employed.

75. Experts in the Queensland Planning and Environment Court are required to confer at an earlier stage in the process, without individual reports being prepared and with their opinions being formulated in a process of mutual peer review while quarantined from the parties and their legal representatives. Rackemann DCJ argues that this provides a more satisfactory, useful and timely professional discourse than is achieved by reliance on concurrent evidence at trial.⁹³

76. While these concerns point to certain weaknesses in the current model for hearing concurrent evidence, in practice the procedure has had considerable success in increasing the efficiency of court proceedings, especially in cases where there are more than two experts.⁹⁴ It may be that in terms of some issues the traditional method of cross-examination of each expert separately is more appropriate, but this is not constrained under the concurrent evidence model, and the Court would benefit from having the other expert in the room to clarify the point of disagreement.

77. McClellan J, the current Chief Judge of the Common Law Division of the Supreme Court of New South Wales, has praised concurrent evidence procedures, and is in fact responsible for instigating the widespread use in the Land and Environment Court and in the Supreme Court. He notes that, “experience shows that provided everyone understands the process at the outset, in particular that it is to be

⁹¹ The Hon Judge M E Rackemann, “The Management of Experts” (2012) 21 *Journal of Judicial Administration* 168, p 176.

⁹² *Ibid.*

⁹³ *Ibid.*, p 168.

⁹⁴ The Hon Justice Peter Garling, above n 86, p 60.

a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing.”⁹⁵

78. In addition, concurrent evidence procedures have received support from the experts themselves, as they enable experts to communicate their opinions more effectively, because they are not confined to answering the questions of the advocates. This in turn, increases the capacity of the judge to decide which expert to accept.⁹⁶

79. In *Strong Wise Ltd v Esso Australia Resources Ltd*,⁹⁷ Rares J directed eight expert witnesses who gave evidence over five separate areas of specialised knowledge to confer, without parties or lawyers, and prepare a joint report. His Honour noted that the joint reports:⁹⁸

were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. First, the experts usually will readily accept the other’s opinion on the latter’s assumptions... Second, the process then usually identifies the critical areas in which the experts disagreed.

80. His Honour also directed the experts in each discipline to give evidence concurrently, noting:⁹⁹

[t]he great advantage of this process is that all the experts are giving evidence on the same assumptions... and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement.

81. In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* directions were made for concurrent expert evidence.¹⁰⁰ This resulted in the oral evidence being confined to four days of a 13-day trial.¹⁰¹ In fact, oral evidence by the six town planning and architectural experts took only two days.

⁹⁵ The Hon Justice Peter McClellan, above n 2, p 18.

⁹⁶ The Hon Justice Peter McClellan, above n 2, p 18.

⁹⁷ (2010) 185 FCR 149.

⁹⁸ *Ibid* at [94].

⁹⁹ *Ibid* at [96].

¹⁰⁰ *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 170 at [1] per Talbot J.

¹⁰¹ *Ibid* at [14] per Talbot J.

DUTIES OF EXPERTS

General

82. The duties of experts were succinctly summarised in the case of *Wood v R*¹⁰² as follows:

- (1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. See also *Whitehouse v Jordan* (1981) 1 WLR 246 at 256 (Lord Wilberforce).
- (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
- (3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.
- (4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
- (5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
- (6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert report, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
- (7) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

83. These duties are largely set out in the code of conduct that the expert must acknowledge, referred to above.¹⁰³

¹⁰² [2012] NSWCCA 21 at [719], citing *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82 per Cresswell J.

¹⁰³ See also Rose J, "The Evolution of the Expert Witness" (2009) 23(1) *Australian Journal of Family Law* for a discussion of the duties of expert witnesses.

84. In *Gilham v R* the Court of Criminal Appeal stated, in relation to the expert's paramount duty to the Court:

An expert is not an advocate for a party. It is in the discharge of the different but allied obligations of the expert and the Crown Prosecutor that the jury is educated and informed about matters in issue between the Crown and the accused which are beyond the jury's experience. Where the views of the experts differ, the extent and basis for disagreement can then be tested, if necessary, with the Crown seeking leave to cross-examine where the evidence might prove to be unfavourable under s 38 of the *Evidence Act*... It is in that process that the interests of justice are preserved and advanced.

85. In *Vilro Pty Ltd v Roads and Traffic Authority of NSW* the Court said that this duty includes the following:¹⁰⁴

it is expected that when an expert gives a commitment that he or she will be available to attend a hearing at which he or she is to give evidence in respect of a report prepared earlier in the proceedings, this commitment will be honoured save in only the most exceptional circumstances that will generally be beyond the control of the expert. Any failure in this regard breaches not only the expert's duty to the client but, and more importantly, the expert's paramount duty to the court.

Independence and Impartiality

86. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.¹⁰⁵ An expert may be precluded from providing expert evidence where they have an interest in the proceedings, for example, he or she are an employee of one of the parties. That said, the evidence may be given less weight.¹⁰⁶

87. Of course experts must avoid conflicts of interest, and if they arise, terminate their engagement. If not, they may be restrained by court order from acting in the proceedings or for a particular party. In *Australian Leisure and Hospitality Group v Dr Judith Stubbs*,¹⁰⁷ the Supreme Court made orders against Dr Stubbs restraining her from disclosing confidential information of the plaintiffs to one of the defendants in the proceedings and restraining her from acting as an expert witness in forthcoming

¹⁰⁴ [2010] NSWLEC 141 at [37] per Pepper J.

¹⁰⁵ *Practice Note Class 1 Residential Development Appeals* at [58], *Practice Note Class 1 Development Appeals* at [51], *Practice Note Classes 1,2 and 3 Miscellaneous Appeals* at [39], *Practice Note Class 3 Compensation Claims* at [35] and *Practice Note Class 3 Valuation Objections* at [43].

¹⁰⁶ *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454 at [7].

¹⁰⁷ [2012] NSWSC 215.

proceedings in the Land and Environment Court. Dr Stubbs had initially been engaged to provide a social impact assessment to support the proposed development of a Dan Murphy's liquor store in Nowra, which was opposed by the local council. Her engagement was terminated following her preparation of an initial report. Subsequently she was engaged by the council to provide a similar assessment in respect of the same development. The plaintiffs objected to her engagement and the Court agreed, stating:¹⁰⁸

It is realistic to recognise, without casting doubt on her bona fides or honesty, that Dr Stubbs might have some practical difficulty in compartmentalising in her mind the various parcels of information, including the confidential information, to be considered in fulfilling her retainer by the Council.

88. Where an expert does have a material interest in the proceedings, the expert must take considerable care to ensure that they fulfil their duties to the Court by providing evidence that is “uninfluenced as to form or content by the exigencies of litigation” and objective and unbiased in relation to the matters within his or her expertise. In these circumstances, the expert “must be in a position to exclude from consideration everything except the matters identified as the facts upon which his or her opinions are based.”¹⁰⁹ Whether the expert has the requisite degree of impartiality is a matter that will be tested in cross-examination¹¹⁰ or by the Court.¹¹¹

89. In *Willoughby City Council v Transport Infrastructure Development Corporation (No 2)*,¹¹² an expert was held not to be independent because not only was she an employee of a party, she was involved in the proposal for the development of the land in question, and therefore, not independent from the matter in dispute. Her report contained facts and partisan opinions, which demonstrated she had adopted the role of an advocate for a party.¹¹³

90. The case of *Wood v R* provides an excellent illustration of an expert acting without the requisite degree of impartiality through the course of proceedings.

¹⁰⁸ *Australian Leisure and Hospitality Group v Dr Judith Stubbs* [2012] NSWSC 215 at [40].

¹⁰⁹ *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764 at [256].

¹¹⁰ *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [211].

¹¹¹ *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [348] and *Pittwater Council v A1 Professional Tree Recycling Pty Ltd (No 2)* [2008] NSWLEC 325. See also The Hon Justice French “Expert testimony, opinion, argument and the rules of evidence” (2008) 36 *Australian Business Law Review* 263, pp 279-280.

¹¹² [2008] NSWLEC 238.

¹¹³ *Willoughby City Council v Transport Infrastructure Development Corporation (No 2)* [2008] NSWLEC 238 at [11].

Following the trial, but while the appeal was pending, Prof Cross published a book entitled *Evidence for Murder: How Physics Convicted a Killer*. In his book, he stated that it was “well known” that experts called by the prosecution tend to support the prosecution case.¹¹⁴ The book disclosed several instances where Prof Cross acted in a partial manner. Where he was not called to give evidence in the original inquest, he continued to actively participate by contacting the media and several key figures in the investigation.¹¹⁵ He admitted having “no previous experience in this type of investigation”, yet determinedly sought to “solve the problem” and “argue (his) case” in relation to “how Caroline (Byrne) managed to be wedged in the rocks below”.¹¹⁶ In short:¹¹⁷

Professor Cross took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view from speaking with some police... and from his own assessment of the circumstances that the applicant was guilty and it was his task to assist in proving his guilt.

91. From these accounts, and others provided in the book, the Court of Appeal deduced that Prof Cross had given an incomplete account during his evidence at trial as to the extent of his involvement in the investigation. The Court held that the book significantly diminished Prof Cross’ credibility¹¹⁸ and Prof Cross’ evidence was held to be of little if any evidentiary value¹¹⁹.

92. The objectivity of the expert is essential to the credibility and reliability of expert evidence. This will not be lost by forcefully defending an opinion genuinely held by the expert, but it may be compromised “if the witness is unwilling to consider alternative factual scenarios or is unwilling to appropriately acknowledge recognised differences of opinion or approach between experts.”¹²⁰

¹¹⁴ *Wood v R* [2012] NSWCCA 21 at [731].

¹¹⁵ *Ibid* at [735].

¹¹⁶ *Ibid* at [738].

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* at [717].

¹¹⁹ *Ibid* at [758].

¹²⁰ *Practice Direction Guidelines for Expert Witnesses*, Federal Court of Australia, issued on 5 May 2008 and The Hon Justice P Biscoe, *Court Practice and Procedure for Experts* (paper presented at the Environmental Institute of Australia and New Zealand’s Professional Environmental Practice Course Program, 15 May 2008) at [4].

93. If an expert is retained on the basis of contingency fees or a deferred payment scheme, this must be disclosed to the Court.¹²¹ This should be done either in the expert report or as an annexure to the report. The purpose of this is to ensure that the Court is aware of any financial interest an expert might have in the outcome of the proceedings.¹²² This will not automatically prevent the evidence from being admissible, but may affect the weight given to it.

WHAT TO DO AS AN EXPERT WITNESS

The Content of Expert Reports

94. The expert report should commence with an acknowledgement by the expert that he or she has read the code of conduct and agrees to be bound to it.¹²³ As stated above, the purpose of the acknowledgement is to ensure that the “expert has approached the task responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court.”¹²⁴

95. The report must include details of the expert’s qualifications.¹²⁵ All evidence that would otherwise be adduced orally should be contained in the expert report. If the information is not contained in the report the Court may grant leave for it to be adduced only in exceptional circumstances but is more likely to do so if the information merely updates the report.¹²⁶ Having said this, leave is usually granted to permit the expert to clarify matters already contained in the report.

96. An expert report must set out any facts or assumptions that the findings of the report are based on.¹²⁷ These assumptions should match the facts that it is believed will be found by the Court. Discrepancies between the assumptions made by the

¹²¹ UCPR r 31.22

¹²² The Hon Justice P Biscoe, above note 120 at [12].

¹²³ UCPR r 31.23.

¹²⁴ *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49 at [46].

¹²⁵ UCPR Sch 7 cl 5(1)(a), r 31.27(1)(a).

¹²⁶ UCPR r 31.27(4).

¹²⁷ UCPR Sch 7 cl 5(1)(b); r 31.27(1)(b), *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] and *INL Group Ltd v Director-General of the New South Wales Department of Planning* [2011] NSWLEC 256 at [38].

expert and the facts found by the Court may result in the expert's opinion being given so little weight it becomes worthless.¹²⁸

97. Similarly, if the assumptions are not specified, the Court is unable to ascertain how the expert has applied their specialised knowledge to the facts and this may result in the report being inadmissible or, at the very least, being given very little weight in the proceedings.¹²⁹

98. Each opinion expressed by the expert must be supported by the reasons for that opinion.¹³⁰ If it has been requested that the expert comment on something that is beyond their expertise or there is insufficient data supporting the conclusions reached, this should be specified in the report.¹³¹

99. The report should also set out all materials and literature that have been used to support the opinions of the report, any examinations, tests or other investigations upon which the expert has relied upon or has carried out.¹³² Expert reports should be as clear and transparent as possible; else they risk being declared inadmissible under s 135 of the *Evidence Act*.

100. All experts should be mindful of the fact that judges do not have the same level of knowledge, expertise or understanding as them. The report must therefore be written in plain English, using headings and summaries. Reports that are particularly lengthy or complex should include an executive summary.¹³³

101. In the Land and Environment Court, the parties' legal advisors are permitted to consult with the expert in order to ensure that the report is on point in regards to the issues before the Court. This is contrasted with the position in the Queensland Planning and Environment Court, where the parties' experts are effectively quarantined until after they have conferred in relation to the relevant issues.

¹²⁸ *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 at [14].

¹²⁹ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] and *INL Group Ltd v Director-General of the New South Wales Department of Planning* [2011] NSWLEC 256 at [38].

¹³⁰ UCPR Sch 7 cl 5(1)(c), r 31.27(1)(c), r 31.27(2) and r 31.27(3).

¹³¹ UCPR Sch 7 cl 5(1)(d) and 5(3), r 31.27(1)(d).

¹³² UCPR Sch 7 cl 5(1)(b) and (e), r 31.27(1)(e), r 31.27(1)(f).

¹³³ UCPR Sch 7 cl 5(1)(g), r 31.27(1)(g) and *INL Group Ltd v Director-General of the New South Wales Department of Planning* [2011] NSWLEC 256 at [38].

102. A good illustration of circumstances leading to the inadmissibility of an expert's report is contained in *INL Group Ltd v Director-General of the New South Wales Department of Planning*.¹³⁴ In that case the report of Mr Warnes, a town planner, was rejected because it transgressed the Code in several material respects, namely:¹³⁵

- (a) the report did not state the facts and assumptions upon which it was based, contrary to cl 5(1)(b) of the Code;
- (b) the report did not state the reasons for opinions expressed in it, contrary to cl 5(1)(c);
- (c) the report contained legal opinions. That is to say, Mr Warnes purported to answer questions that were reserved for the Court on the application for judicial review; and
- (d) the report, which was lengthy, did not contain a summary as required by cl 5(1)(e) of the Code.

103. Further, the report was rejected because it contained “intemperate and inflammatory language”, was apt to mislead on critical issues, and many of the points sought to be made referred to material that was irrelevant.¹³⁶ Finally, the Court held that the report, read in its entirety, could be characterised as amounting to a submission on behalf of the applicant.¹³⁷

104. It is important, however, that lawyers do not go beyond making sure the report is on point and beyond ensuring that the legal tests of admissibility are addressed, in such a way as to alter the substance of the expert's report.¹³⁸ This would lead to the report being given very little weight, or being inadmissible. It must be the expert's, and not the legal representatives', report.

¹³⁴ [2011] NSWLEC 256.

¹³⁵ *Ibid* at [38].

¹³⁶ *Ibid* at [36].

¹³⁷ *Ibid* at [36].

¹³⁸ *Whitehouse v Jordan* [1980] 1 All ER 650 at 654.

Expert Conferences

105. If a parties' single or joint expert is not appointed and the parties engage their own experts, the Court will almost always direct that the parties' experts attend a joint conference and produce a joint report to the Court."¹³⁹

106. The purpose of expert conferences, or conclaves, is to allow the experts to discuss the issues in dispute in a neutral context where questions can be asked and the issues in dispute narrowed and clarified. This facilitates the identification, investigation and resolution of the real issues in contest between the experts.¹⁴⁰ Discussions between the experts should be full and frank. The content of discussions between the experts cannot be disclosed at the hearing unless the parties agree or bad faith is alleged.¹⁴¹

107. The advantages of an expert conference are that:

- (a) any extreme or biased views adopted by experts are quickly moderated when they need to be justified before peers;
- (b) factual concessions are easier to make in private rather than in Court where there is pressure in front of the client for the expert to adhere to the original opinion;
- (c) they often disclose facts and/or relevant information not always known or appreciated by other experts; and
- (c) significant points of disagreement can be identified and more adequately defined, while peripheral issues are often isolated or agreed upon.¹⁴²

108. The conference should result in a joint report stating what is agreed and what remains in dispute and why.¹⁴³ Depending on the circumstances, it may be useful to

¹³⁹ *Practice Note Class 1 Development Appeals* at [55].

¹⁴⁰ The Hon Justice Peter Biscoe, *Land and Environment Court of New South Wales: Practice and Procedure* (paper presented at the Australasian Conference of Planning and Environmental Courts and Tribunals, Christchurch, New Zealand, 21 August 2009) at [19].

¹⁴¹ UCPR r 31.24(6).

¹⁴² The Hon Justice J Wood, "Forensic sciences from the judicial perspective: the expert witness in the age of technology" (2003) 23 *Australian Bar Review*, p 137.

produce a table setting out the issues that are agreed upon and the issues that are in dispute, together with brief reasons as to the nature of the dispute.

109. It is important that at the conference the experts make a concerted effort to agree. On occasion, experts have met and refused to agree on matters which are subsequently agreed upon on the first day of the hearing. This merely puts the parties to extra cost with no beneficial outcome.¹⁴⁴

110. It is also important that experts maintain their independence throughout the process. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.¹⁴⁵ There have been instances where experts have agreed at the conference, but subsequently withdrawn or modified their position after further discussions with lawyers. If this occurs, it defeats the purpose of expert evidence as the experts are no longer giving their opinion, but an opinion “filtered by the lawyers.”¹⁴⁶ It will also subject the expert to rigorous cross-examination that may damage his or her credit.

Expert Witness Immunity

111. Expert witness immunity protects experts from being sued as a result of evidence the expert gave in proceedings and in respect of out of court conduct, provided the conduct has a sufficient connection with the proceedings.¹⁴⁷ Witness immunity has a long history, and as early as the sixteenth century a disappointed litigant could not sue those who had given evidence in the hearing.¹⁴⁸ Witness immunity stems from a broader immunity from suit of all persons directly taking part in a trial. Lord Mansfield in *R v Skinner*¹⁴⁹ stated that “neither party, witness, counsel, the jury, or Judge can be put to answer civilly or criminally, for words spoken in office.”

¹⁴³ UCPR r 31.26.

¹⁴⁴ The Hon Justice Peter McClellan, above n 2, p 11.

¹⁴⁵ *Practice Note Class 1 Development Appeals* at [55], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [43], *Practice Note Class 4 Proceedings* at [47], *Practice Note Class 3 Compensation Claims* at [38] and *Practice Note Class 3 Valuation Objections* at [47].

¹⁴⁶ The Hon Justice Peter McClellan, above n 2, p 12.

¹⁴⁷ *Commonwealth v Griffiths* (2007) 70 NSWLR 268 at [42] and [84].

¹⁴⁸ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [39].

¹⁴⁹ (1772) 98 ER 529 at 530.

112. Witness immunity is a “true immunity” from suit, and not just a protection for the purposes of the law of defamation.¹⁵⁰ The immunity is broad and extends to protect witnesses from other forms of action in tort,¹⁵¹ such as claims that witnesses conspired to injure the litigant.¹⁵² It does not matter that the disappointed litigant alleges that the witness acted negligently, deliberately or even maliciously, the immunity still stands.¹⁵³ The immunity also extends to preparatory steps for trial,¹⁵⁴ however, there must remain a connection with the evidence that is to be given in court.¹⁵⁵ Opinions not to be used in court proceedings given principally for advising the client on the merits of their claim will not be covered by the immunity.¹⁵⁶ Finally, the immunity covers the report or reports that an expert witness adopts as, or incorporates into, their evidence.¹⁵⁷

113. Despite the breadth of the immunity, there are some limitations that have been held to apply. For example, the immunity has been held not to extend to disciplinary proceedings before professional tribunals where fitness to practice is in issue,¹⁵⁸ or to preclude prosecutions for perjury, contempt of court or perverting the course of justice.¹⁵⁹ In addition, the immunity for expert witnesses does not apply to advice given in a context that does not have a connection with the evidence that is to be given in court.¹⁶⁰

114. The rationale for witness immunity is based on three main objectives: first, the immunity of witnesses serves to encourage “freedom of expression” or “freedom of speech” so that the court will have full information about the issues in the case;¹⁶¹ second, the immunity protects witnesses who give evidence in good faith from being

¹⁵⁰ *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 740 as cited in *Jones v Kaney* [2011] 2 All ER 671 at [1].

¹⁵¹ *Jones v Kaney* [2011] 2 All ER 671 at [12].

¹⁵² *Cabassi v Vila* (1940) 64 CLR 130 and *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [39].

¹⁵³ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [39].

¹⁵⁴ *Watson v M’Ewan* [1905] AC 480.

¹⁵⁵ *Commonwealth v Griffiths* (2007) 70 NSWLR 268 at [84].

¹⁵⁶ *Stanton v Callaghan* [2000] QB 75 per Chadwick LJ at [100]–[102].

¹⁵⁷ *Ibid.*

¹⁵⁸ *Sovereign Motors Inn v Howarth Asia Pacific* [2003] NSWSC 1120; *Meadow v General Medical Council* [2007] QB 462.

¹⁵⁹ *Commonwealth v Griffiths* (2007) 70 NSWLR 268 at [46].

¹⁶⁰ *Commonwealth v Griffiths* (2007) 70 NSWLR 268 at [84].

¹⁶¹ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [41].

harassed by unjustified and vexatious claims by disgruntled litigants;¹⁶² and third, the immunity avoids a multiplicity of actions where the evidence would be tried again, undermining the finality of judgments.¹⁶³

115. In addition to these objectives, the particular purpose served by the immunity of expert witnesses, as opposed to witnesses of fact, is to ensure that they are able to balance the duty that they owe to their client with the overriding and paramount duty that they owe to the court. It was noted in *Stanton v Callaghan* that:¹⁶⁴

The public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice.

116. Despite the public interest facilitated by the immunity, in a landmark decision the Supreme Court of the United Kingdom in *Jones v Kaney*¹⁶⁵ has abolished the immunity of expert witnesses in that jurisdiction.

117. In that case, a negligence claim was brought by Mr Jones against Mrs Kaney. Mrs Kaney was a consultant psychologist who had been engaged by Mr Jones to give expert evidence in relation to a personal injury claim commenced by him. The claim related to Mrs Kaney's acquiescence to the contents of a joint report, that was in fact prepared solely by the respondent's expert, without amendment or comment and despite the fact that she had espoused differing views in an earlier report.

118. The negligence claim was initially struck out by Blake J on the ground that Mrs Kaney's evidence, in the form of the joint report, was subject to expert immunity.¹⁶⁶ Because the case involved a point of law of general importance, Mr Jones was permitted to appeal directly to the Supreme Court of the United

¹⁶² *Jones v Kaney* [2011] 2 All ER 671 at [15].

¹⁶³ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [42].

¹⁶⁴ [2002] QB 75 per Chadwick LJ at 101.

¹⁶⁵ [2011] 2 All ER 671.

¹⁶⁶ *Jones v Kaney* [2010] EWHC 61(QB).

Kingdom.¹⁶⁷ The Supreme Court, by a majority of five to two, abolished the immunity of expert witnesses from suit for breach of duty, but retained the absolute privilege that experts enjoy in respect of claims for defamation.

119. Following consideration of the various justifications for expert immunity, Lord Phillips held (with the majority agreeing) that:

- (a) the risk of being sued in relation to the provision of expert evidence did not constitute “a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional service”,¹⁶⁸
- (b) the removal of the immunity would not result in any diminution of the expert’s readiness to perform their duty to the court, including that the expert give full and frank evidence to the court even where this involves resiling from an opinion initially expressed;¹⁶⁹ and
- (c) the removal of the immunity would not result in vexatious claims for breach of duty or a multiplicity of suits, because it would be difficult and costly for a lay litigant to prove that an expert had acted negligently.¹⁷⁰ Although claims from those convicted of criminal offences were more likely, such claims would be struck out for abuse of process unless the client first succeeded in getting his conviction overturned on appeal,¹⁷¹

120. In agreeing with Lord Phillips that the immunity should be abolished, Lord Collins noted that:¹⁷²

The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report.

¹⁶⁷ *Jones v Kaney* [2011] 2 All ER 671 at [1].

¹⁶⁸ *Ibid* at [53].

¹⁶⁹ *Ibid* at [56].

¹⁷⁰ *Ibid* at [59].

¹⁷¹ *Ibid* at [60].

¹⁷² *Ibid* at [85].

In dissent, Lord Hope and Lady Hale argued that, as no secure principled basis existed for removal of the immunity, the wiser course would be to leave matters as they stand until the Law Commission or, if appropriate, Parliament addressed the issue.¹⁷³

121. In contrast to the position in the United Kingdom, the immunity of expert witnesses has been re-affirmed in a number of Australian cases.¹⁷⁴ In addition, the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*,¹⁷⁵ confirmed the position of general witness immunity. However, the decision in *Jones v Kaney* has been flagged as raising potential “difficulties” with this position,¹⁷⁶ although the issue has yet to be squarely dealt with.

122. In *Commonwealth v Griffiths*,¹⁷⁷ Mr Griffiths was convicted on the basis of a certificate stating the substance in his possession was a prohibited drug. On appeal, the conviction was overturned and a verdict of acquittal was entered on the basis that the testing of the substance had been manipulated. Mr Griffiths commenced proceedings against the Commonwealth, who conducted the laboratory where the tests were done, and the expert that did the testing. The New South Wales Court of Appeal held that the immunity protected both the Commonwealth and the expert from being sued. In doing so the Court of Appeal noted that:¹⁷⁸

The immunity is founded ultimately in consideration of the finality of judgments... Accordingly, a trial based upon the negligent performance of [Mr Griffiths'] testing would involve the retrial, not only of the evidence given at trial but also of the preparatory steps taken to prove an essential ingredient of the charge brought against Mr Griffiths, namely, that the substance was the prohibited substance...

123. Special leave to appeal to the High Court was refused on the basis that:¹⁷⁹

[A] case in negligence, even if it could otherwise in law be made out ... could not succeed if the witness immunity doctrine is engaged in the circumstances of [the] case.

¹⁷³ Ibid at [173].

¹⁷⁴ *Sovereign Motors Inns v Howarth Asia Pacific* [2003] NSWSC 1120, *James v Medical Board of South Australia* [2006] SASC 267 and *Commonwealth v Griffiths* [2007] NSWCA 370. Leave to appeal to the High Court was refused (see *Griffiths v Ballard* [2008] HCATrans 227).

¹⁷⁵ (2005) 223 CLR 1.

¹⁷⁶ *Sydney Local Health Network v QY* [2011] NSWCA 412 at [164].

¹⁷⁷ (2007) 70 NSWLR 268.

¹⁷⁸ *Commonwealth v Griffiths* (2007) 70 NSWLR 268 at [93].

¹⁷⁹ *Griffiths v Ballard* [2008] HCATrans 227 per Gummow ACJ.

124. In considering whether Australia would be likely to follow the United Kingdom's lead and abolish expert immunity, it is important to note that, unlike the United Kingdom, Australia has chosen to retain advocate's immunity.¹⁸⁰ Throughout the judgment of *Jones v Kaney* the experience and consequences of the removal of the immunity from advocates was held up as a model for the negligible likely adverse impacts of the abolishment of the immunity for experts, particularly given that the removal of immunity from advocates had not resulted in a flood of vexatious claims or diminished the ability of advocates to perform their duty to the court in the United Kingdom.¹⁸¹ Yet this comparison offers little comfort in Australia. In *D'Orta-Ekenaike v Victoria Legal Aid*, the central justification for retaining advocate's immunity was the principle "that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances."¹⁸² The concern over the finality of judgments is equally applicable to expert's immunity, because abolishing the immunity would create an exception to that tenet, in that there would be re-litigation of a controversy as a result of what had happened during, or in preparation for, the hearing.

125. Nevertheless, as has been noted by Bergin J, the comparison of advocates and experts is somewhat "paradoxical, particularly when the Code of Conduct exhorts experts not to take on the role of an advocate."¹⁸³ One of the main differences between experts and advocates is, as has been discussed earlier, that the expert owes an overriding duty to the court to act wholly impartially when giving evidence, which can conflict with the duty that they owe to their client. This distinction supports the argument that once the expert is giving evidence in court, or preparing to do so, he or she can no longer be held liable for breach of duty to his or her client.¹⁸⁴

126. The Court in *Jones v Kaney* found that there was no conflict between the duty of the expert to the client and the duty to the court, as the expert agrees with the client that they will perform the duties that they owe to the court. Practically,

¹⁸⁰ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

¹⁸¹ *Jones v Kaney* [2011] 2 All ER 671 at [57] and The Hon Justice P A Bergin, *The Expert's Lament* (paper presented at the Land and Environment Court of New South Wales Annual Conference 2011, Sydney, 5-6 May 2011) at [53].

¹⁸² *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [45].

¹⁸³ The Hon Justice P A Bergin, above note 181 at [53].

¹⁸⁴ *Jones v Kaney* [2011] 2 All ER 671 at [47].

however, it is difficult to see how these two duties will not result in tension, thereby resulting in the expert being less candid in their opinions given in joint conferences or in open court, especially where to do so would harm the interests of the party retaining him or her.

127. The High Court noted in *D’Orta-Ekenaike v Victoria Legal Aid*¹⁸⁵, in relation to the retention of immunities, “what is at stake is the public interest in the ‘effective performance’ of its function by the judicial branch of government”.¹⁸⁶ In order to fulfil this public interest and effectively perform, courts need candid expert assistance. In order for processes like joint conferencing and concurrent evidence to work effectively and to facilitate the giving of expert evidence, experts need to be unconstrained and, if factual assumptions change, know that they can resile from a previously held and expressed opinion without fear of being sued. The retention of the immunity, therefore, is in the public interest: to ensure the proper and efficient administration of justice.

128. If the immunity is to be removed in Australia, one proposal put forward by Bergin J in order to reduce the uncertainties that would result, is to have panels of experts so that:¹⁸⁷

When an issue arises in litigation upon which the court will require expert assistance a witness or witnesses in the relevant specialty could be drawn by ballot (or some other method) from the panel. The expert or experts so drawn would then provide the relevant reports, take part in the relevant meetings and give concurrent evidence, if that process is appropriate in the particular case. There is also the need to consider the necessity for pre-litigation advice. It may be worth considering a prelitigation panel consisting of experts who are willing to provide advice on the merits of particular cases.

129. The aim of such a system is to establish a regime in which the expert’s only duty is to the Court, thereby reducing the liability of experts to their clients and diluting adversarial bias.¹⁸⁸

¹⁸⁵ (2005) 223 CLR 1.

¹⁸⁶ Ibid at [42].

¹⁸⁷ The Hon Justice P A Bergin, above note 181, at [58].

¹⁸⁸ The Hon Justice P A Bergin, above note 181, at [60].

Expert Assistance vs Expert Evidence

130. When engaged to provide expert evidence, a distinction must be drawn between the provision of assistance and the provision of evidence. A party may seek to ask questions that go beyond what is required or desirable as evidence. Such information may be for the purpose of cross-examining an opponent's expert.

131. In noting that a report, which was prepared by an expert accountant, contained "precious few accounting opinions" and was more akin to an argumentative case put forth by a litigant, Allsop J in *Evans Deakin Pty Ltd v Sebel Furniture Ltd* highlighted that:¹⁸⁹

There may well have been great value in those preparing Sebel's case obtaining the views of [the accounting expert]. Such views would no doubt have assisted them in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert *assistance* for a party preparing and running a case. Expert *evidence* in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing.

132. While it is permissible for a single expert to fill both of these roles, it is important that the "person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate."¹⁹⁰ If the same expert is used, the expert evidence will be given little weight if the report makes absolute claims about debateable propositions, rejects the existence of obvious qualifications or areas of uncertainty, treats counsel for cross-examination with contempt, offers combative answers to questions or responds to questions in a way that is calculated to advance the case of the party calling the witness, and goes beyond what is necessary to answer the question.¹⁹¹

133. Several strategic reasons mitigate against using the same expert, including: it may diminish the perceived impartiality of the expert and therefore result in the report being given less weight; the role of the expert in the preparation of the case might then be the subject of cross-examination; the Court may exercise its discretion to exclude the evidence if the probative force of the evidence has been weakened, due

¹⁸⁹ [2003] FCA 171 at [676].

¹⁹⁰ *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

¹⁹¹ The Hon Justice French, above note 111, p 279.

to the exposure to inadmissible evidence in case preparations; and the expert being privy to privileged communications during case preparation may result in the inadvertent waiver of privilege.¹⁹²

134. Where a party needs both expert evidence and assistance, the party should seriously consider engaging a second expert for the purpose of assistance, rather than evidence.

CONCLUSION

135. Given the highly technical nature of many of the issues that the Court must determine across all Classes of its jurisdiction, the Court is increasingly reliant on expert evidence. But it must be remembered that experts are there to assist the Court in determining the real issues in dispute between the parties and that their paramount duty is to the Court. If this is borne in mind, then preparing expert evidence ought neither to be a daunting nor a complex process and the likelihood of the expert's evidence being of limited utility, or worse, inadmissible, should be eliminated. By complying with the relevant rules of practice and procedure with respect to expert evidence in the Land and Environment Court, not only will the Court be genuinely assisted by the evidence of the expert, but in turn, so will the client.

21 January 2013

**The Hon Justice Rachel Pepper
Land and Environment Court of New South Wales**

¹⁹² See Hugh Stowe, "Preparing Expert Witnesses: A Search for Ethical Boundaries" (Summer 2006/2007) *Bar News* 44, pp 46-47.